FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Second Appeal No. 475/2007
(Ramaji Sakharam Sherki **VERSUS** Dadaji Sakharam Sherki **)**

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Mr. Dhumale, counsel for the appellant.

CORAM : Smt. Vasanti A. Naik, J.
DATE : 26th September, 2007.

Heard the learned counsel for the appellant.

The appellant is the original plaintiff. A suit was filed by the plaintiff for grant of a decree of specific performance of contract. According to the plaintiff, the defendant, who was his real brother, had agreed to sell the suit property to the plaintiff by an agreement dated 09.04.1990. According to the agreement, the sale-deed was to be executed on or before 31.06.1991. It was then pleaded by the plaintiff that time was not the essence of the contract and the defendant had agreed to execute the sale-deed in favour of the plaintiff even after 31.06.1991. The plaintiff pleaded that the defendant's wife illegally issued a notice to the plaintiff six months after 31.06.1991 to inform the plaintiff that the contract between the parties was cancelled as the plaintiff had not performed his part of the contract by paying the balance consideration and getting the sale-deed executed from the defendant.

The defendant denied the claim of the

plaintiff and pleaded that the plaintiff was not ready and willing to perform his part of the contract. The defendant denied that he had executed an agreement of sale in favour of the plaintiff. According to the defendant, the defendant, his wife and his son were cultivating the suit land. The defendant, therefore, sought the dismissal of the suit.

The trial Court framed the issues and after the evidence was tendered by both the parties, the trial Court, on an appreciation of the same, dismissed the suit filed by the plaintiff by holding that the plaintiff had failed to prove that he was ready and willing to perform his part of the contract. The trial Court then held that the suit property was the ancestral property and the defendant was the real brother of the plaintiff and grant of a decree of specific performance of contract would unnecessarily create complications in the matter.

The plaintiff challenged the judgment in appeal. The first appellate Court confirmed the findings recorded by the trial Court and dismissed the appeal filed by the plaintiff.

I have perused the judgments passed by both the Courts. I have also perused the plaint pleadings. It is conspicuous to note that the plaintiff had failed to aver in the plaint that he was ready and willing to perform his part of the contract. Apart from

the absence of the aforesaid averments, the plaintiff had not pleaded the facts showing the readiness and willing of the plaintiff to perform his part of the contract. In the absence of the averments to the aforesaid effect, the trial Court held that the plaintiff had failed to aver and prove that he was ready and willing to perform his part. The discretion exercised by the trial Court was, therefore, rightly not interfered with by the first appellate Court. The findings recorded by both the Courts on the question of readiness and willingness of the plaintiff to perform his part of the contract are pure findings of fact based on a proper appreciation of the material evidence on record. They do not give rise to any substantial question of law.

The second appeal is, therefore, dismissed with no order as to costs.

JUDGE

APTE